No. 87-5666/87-6026

87-5765

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOSE MARTINEZ HIGH,

Petitioner,

vs.

WALTER ZANT, Warden,

Respondent.

HEATH A. WILKINS,

Petitioner,

vs.

STATE OF MISSOURI,

Respondent.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT AND TO THE SUPREME COURT OF THE STATE OF MISSOURI

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST OF AMICI CURIAE[1]

The National Legal Aid and Defender Association (NLADA) is a non-profit organization with a membership of 2,300 legal aid and defender offices employing approximately 25,000 professionals, and, in addition, over 1,000 individual members. NLADA's primary purpose is to assist in providing effective legal services to persons, including juveniles, unable to retain counsel in criminal and civil proceedings.

The National Association of Criminal Defense Lawyers, Inc. (NACDL) is a District of Columbia non-profit corporation with a membership of more than 5,000 lawyers, including representatives of every state. NACDL was founded over

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[1] This brief is filed with the consent of all parties. Copies of the consent letters are on file with the Clerk of the Court.

twenty-five years ago to promote study and research in the field of criminal defense law, to disseminate and advance the knowledge of the law in the field of criminal defense practice and to encourage the integrity, independence and expertise of defense lawyers.

Among NACDL's stated objectives is the promotion of the proper administration of criminal justice. Consequently, NACDL concerns itself with the protection of individual and human rights and the improvement of the criminal laws, its practices and procedures. A cornerstone of this organization's objective, and of the criminal justice system, is the fundamental constitutional prohibition against cruel and unusual punishment guaranteed by the Eighth Amendment to the United States Constitution. Additionally, NACDL has long been concerned with the

treatment of juveniles by the criminal justice system. Therefore, NACDL is very concerned about these cases, which involve the question of whether the Eighth Amendment permits persons under the age of eighteen to be sentenced to death.

SUMMARY OF ARGUMENT

This case presents the question of whether the Eighth Amendment prohibits the execution of persons under the age of eighteen. This Court's prior decisions interpreting the Eighth Amendment's ban against cruel and unusual punishment establish that the Court cannot determine whether a particular punishment violates "the evolving standards of decency that mark the progress of a maturing society," Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion), merely by examining statutory provisions and jury verdicts. Rather, in the final analysis, this Court

must exercise its own independent judgment in order to determine whether we may sentence our children to death.

In utilizing its independent and informed judgment, the Court must consider the lessened moral responsibility that is inherent in adolescents. Because the moral culpability of persons under the age of eighteen is intrinsically less than that of adults, capital punishment serves no legitimate penological interest when imposed upon them; the state's interests in retribution and deterrence are not furthered by the execution of teenagers. Thus the death penalty is an excessive punishment for persons under the age of eighteen, and this ultimate sanction is no longer compatible with our society's evolving standards of decency when applied to such young offenders.

ARGUMENT

I. IN THE FINAL ANALYSIS THIS COURT MUST RELY UPON ITS OWN INFORMED JUDGMENT IN DETERMINING THE CONSTITUTIONALITY OF THE DEATH PENALTY FOR JUVENILES.

The Eighth Amendment prohibits the infliction of any punishment which is "cruel and unusual."[2] Although this Court has determined that the death penalty is not cruel and unusual punishment per se, Gregg v. Georgia, 428 U.S. 153 (1976), it

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2 In construing the Eighth Amendment's prohibition against cruel and unusual punishment, this Court has determined that a punishment is "cruel and unusual" if it is excessive. Weems v. United States, 217 U.S. 349 (1910). An excessive punishment is one which is disproportionate to the crime, or which makes no measurable contribution to any acceptable goal of criminal punishment. Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion); Gregg v. Georgia, 428 U.S. 153, 173 (1976). A punishment is also constitutionally impermissible if it offends the "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion); Ford v. Wainwright, 477 U.S. 399, 406 (1986); Enmund v. Florida, 458 U.S. 782 (1982).

has held that the death penalty violates the Eighth Amendment when imposed, under any circumstances, upon certain categories of offenders, see Ford v. Wainwright, 477 U.S. 399 (1986) (Eighth Amendment prohibits execution of the currently insane), or for certain categories of offenses, see Enmund v. Florida, 458 U.S. 782 (1982) (Eighth Amendment prohibits capital punishment for felony-murder where offender did not personally kill or intend that lethal force be used); Coker v. Georgia, 433 U.S. 584 (1977) (Eighth Amendment prohibits capital punishment for crime of rape of adult woman).

In deciding whether the death penalty is a permissible punishment for either a particular category of offenders or for a particular offense, the Court has examined what objective evidence is available that reflects whether the punishment is

compatible with our society's evolving standards of decency. However, the Court has consistently recognized that in the final analysis it must determine whether the Eighth Amendment tolerates a particular sentencing practice. Thus in Coker v. Georgia, 433 U.S. at 597, the Court stated: "[R]ecent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy [over the death penalty for rape], for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment." The essentially independent nature of the Court's judgment was reaffirmed in Enmund v. Florida, 458 U.S. at 797[3]: "Although the

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[3] See also Thompson v. Oklahoma, ___U.S.____, 108 S.Ct. 2687, 2692, n.8 (1988) (quoting Coker for the proposition

judgments of legislatures, juries, and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty [upon the particular category of offenders in question]."

In examining whether the death penalty for juveniles under the age of sixteen was an unconstitutionally excessive punishment, see Thompson v. Oklahoma, __U.S._____, 108 S.Ct. 2687 (1988), the Court focused primarily upon certain available objective criteria, such as legislative enactments and jury verdicts. The plurality concluded, based upon a review of the relevant statutory provi-

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that the Supreme Court's own judgment must ultimately be used in the interpretation of the Eighth Amendment); see generally Robinson v. California, 370 U.S. 660 (1962) (Court relied on its independent judgment in determining that Eighth Amendment did not permit criminalization of drug addiction).

sions and jury verdicts, that the imposition of the death penalty upon those under sixteen violated the Eighth Amendment. See Thompson, 108 S.Ct. at 2692-98. Justice O'Connor suggested that more input from state legislatures was necessary, 108 S.Ct. at 2706-11, while the dissenters were convinced that there was no constitutional violation, 108 S.Ct. at 2711-27. Amici agree that an examination of the particular objective indicia of societal consensus relied upon by the plurality in Thompson is informative. However, the question of whether the Eighth Amendment sanctions capital punishment for minors--for those under the age of eighteen--cannot be reduced to a statistical exercise.

In Coker v. Georgia, for example, the Court examined objective measures of societal practice relating to the execu-

tion of persons convicted of rape. While finding that those measures pointed to a consensus that the death penalty was an excessive punishment for the crime of rape,[4] the majority went on to conduct its own, separate analysis--an analysis which "requires the exercise of judgment, not the reliance upon personal preferences." Trop v. Dulles, 356 U.S. at 103 (holding unconstitutional punishment of desertion through loss of citizenship). A similar analysis must be made by the Court in determining the constitutionality of capitally punishing children under the age of eighteen. Thus although measures such as legislative actions, jury verdicts,[5]

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[4] See Coker, 433 U.S. at 591-97.

[5] Although jury verdicts are generally considered to be a reflection of contemporary community standards, juries in capital cases do not reflect the whole array of opinion within any community. The process of death-qualification, which the Court has allowed for state's enforcement of their capital statutes, see Lockhart v. McCree, 476 U.S. 162 (1986), unquestionably eliminates from juries all those who cannot consider the use of death as punishment. An examination of jury verdicts is thus an examination of what only part of the community believes is appropriate. That part of the community which would not consider the imposition of a death sentence--a part which must be taken into account in any assessment of contemporary standards of decency--is thus excluded when jury verdicts are examined. The fact that such a small number of juveniles have been sentenced to death by such juries is, accordingly, quite impressive.

and public opinion polls, are indicators of our societal standards, they do not determine the constitutional question presented. This Court must ultimately bring its own judgment to bear in determining whether our evolving standards of decency endorse the execution of those under the age of eighteen.

The Eighth Amendment was drafted by the framers with the clear understanding that this Court would shoulder the burden of authoritatively determining the

constitutional validity of punishments as the nation progressed. Weems v. United States, 217 U.S. 349, 378 (1910). The decisions interpreting the Amendment's prohibition of cruel and unusual punishment have repeatedly recognized its evolutionary character. In Weems, the Court, discussing the flexibility of constitutional interpretation with respect to the Eighth Amendment, stated: "The clause of the Constitution ... may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." 217 U.S. at 378 (citations omitted). A half-century later, the Court reaffirmed Weems' holding, recognizing that "the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving

standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. at 100-01. More recently, the Court recognized that "[t]he Amendment embodies 'broad and idealistic concepts of dignity, civilized standards, humanity, and decency...,' against which we must evaluate penal measures," Estelle v. Gamble, 429 U.S. 97, 102 (1976) (quoting Jackson v. Bishop, 404 F.2d 571, 579 (8th Cir. 1968)); see also Ford v. Wainwright, 477 U.S. at 406. The execution of juveniles as we approach the 1990s is inconsistent with our current enlightened sense of humane justice and would greatly undermine the evolving standards of decency that mark the progress of our maturing society.

For this Court to be able to carry out its duty of interpreting the Eighth Amendment in a "flexible and dynamic

manner," Gregg v. Georgia, 428 U.S. at 171, it must inevitably look not only to objective data but past that, to its own considered collective judgment. Its searching examination of the broad and idealistic precepts of the Eighth Amendment requires more than a statistical survey of sentencing practices; rather it requires an enlightened mind turned toward "what may be." Weems, 217 U.S. at 373. Such informed and considered judgment requires no less than a broad vision of what we as a society make ourselves out to be, and cannot be avoided by the totaling of arithmetical columns.

This broad vision, moreover, is not dependent on the subjective beliefs of individual Justices, but rather rests upon other indicia--depending of course on the category of persons involved--of the acceptability of sentencing those persons

to death. In order to properly resolve the question presented in this case, whether it is permissible to execute minors, it is imperative that the Court not exclusively focus on the decisions of various legislatures, judges and juries. To do so is to fail to realize that this Court serves a unique function in our constitutional scheme. The Court, insulated by constitutional design from the community pressures that are inherent in any capital murder case and partisan politics, must decide whether children are sufficiently morally culpable to suffer the penalty of death. Therefore, as the ultimate arbiter of the meaning of the Eighth Amendment, it is essential that the Court do more than calculate the "numbers" provided by juries and legislatures in the

various states.[6] Although the Court's independent judgment is--and should be--informed by the objective data, the ultimate issue of the constitutionality of a particular punishment is not compelled by this evidence.

Furthermore, an exclusive focus upon statutes and verdicts does not lead to a fully informed decision in the determination of whether it is consistent with our evolving standards of decency to execute minors. In fact, such an approach ignores significant evidence critical to an enlightened understanding of why those under the age of eighteen should not be sentenced to death. To exclusively focus on the objective indicia of societal

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[6] This is necessarily so. If the Court were to simply defer to legislative enactments and jury verdicts it would not be exercising its own independent judgment, thus making the Court's own Eighth Amendment analysis redundant to an examination of objective indicia.

standards primarily relied upon in Thompson fails to adequately consider germane social science evidence--the work of health professionals, educators, psychologists, and the like--pivotal to the Court's exercise of its informed judgment as to the constitutionality of executing persons under the age of eighteen.

II. A CONSIDERATION OF THE MORAL BLAMEWORTHINESS OF JUVENILES SHOULD LEAD THE COURT TO CONCLUDE THAT NEITHER OF THE TWO PRINCIPAL PURPOSES OF THE DEATH PENALTY ARE MET BY THE EXECUTION OF JUVENILES

The Court has repeatedly recognized that the determination of whether the death penalty is an appropriate punishment--either for an individual offender or for a particular category of offenders--is essentially an inquiry into moral blameworthiness. See Booth v. Maryland, 482 U.S. ____, 107 S.Ct. 2529, 2533 (1987);

Enmund v. Florida, 458 U.S. 782, 798 (1982).[7] As was noted in Spaziano v. Florida, 468 U.S. 447 (1984) (Stevens, J., concurring in part and dissenting in part), "in the final analysis, capital punishment rests on not a legal but an ethical judgment--an assessment of what we called in Enmund the 'moral guilt' of the defendant." 468 U.S. at 481 (quoting Enmund, 458 U.S. at 800-01). In California v. Brown, ___U.S.___, 107 S. Ct. 837 (1987), it was noted that "the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the

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7 In a number of prior decisions the Court has held that the Eighth Amendment forbids both barbarity and excessiveness of punishment in relation to the crime committed. See Coker, 433 U.S. at 592. Excessive punishments are those that: (1) "involve the unnecessary and wanton infliction of pain," Gregg, 428 U.S. at 173; or (2) are "grossly out of proportion to the severity of the crime." Gregg, 428 U.S. at 173.

defendant.... 107 S.Ct at 840 (O'Connor, J., concurring); see also Franklin v. Lynaugh, ___U.S.___, 108 S.Ct. 2320, 2332 (1988) ("the principle underlying Lockett, Eddings, and Hitchcock is that punishment should be directly related to the personal culpability of the criminal defendant") (O'Connor, J., concurring). This is so because the question of whether an individual offender or category of offenders receive their just deserts for a crime can only be determined by assessing their moral blameworthiness in light of the legitimate constitutional purposes of capital punishment. See Tison v. Arizona, __U.S.___, 109 S.Ct. 1676, 1683 (1987).

The legitimate penological interests that have been accepted by the Court for capital punishment are deterrence and retribution. Ultimately, the Eighth Amendment issue turns on the courts'

independent judgment of whether the death penalty as "applied to those in [petitioners'] position measurably contributes" to the "'two principal social purposes ... [of] retribution and deterrence of capital crimes by prospective offenders.'" Enmund v. Florida, 458 U.S. at 798 (quoting Gregg v. Georgia, 428 U.S. at 153). If sentencing a particular offender or category of offenders to death does not further at least one of these two objectives, then the death penalty cannot be imposed consistent with the Eighth Amendment.[8] Examining those goals of retribution and deterrence in light of the lessened moral

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[8] "Unless the death penalty when applied to those in [petitioners'] position measurably contributes to one or both of [the two societal goals of retribution and deterrence], it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." Enmund v. Florida, 458 U.S. at 798 (quoting Coker, 433 U.S. at 592).

culpability of juveniles as a class, it is clear that the Eighth Amendment proscribes the execution of persons who were under the age of eighteen at the time of the commission of the crime.

A. Society's interest in retribution is not furthered by sentencing juveniles to death.

For society to seek retribution for a crime, the criminal must possess a sufficient degree of culpability or responsibility for that criminal act. In California v. Brown, Justice O'Connor stated:

> [D]efendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse. This emphasis on culpability in sentencing decisions has long been reflected in Anglo-American jurisprudence. As this Court observed in Eddings, the common law has struggled with the problem of developing a capital punishment system that is "sensible to the uniqueness of the individual."

> 455 U.S. at 110. Lockett and Eddings reflect the belief that punishment should be directly related to the personal culpability of the criminal defendant. Thus, the sentence imposed at the penalty stage should reflect a reasonable moral response to the defendant's background, character, and crime rather than mere sympathy or emotion.

107 S.Ct. at 841 (O'Connor, J., concurring); see also Tison v. Arizona, 109 S.Ct. at 1683 ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); Booth v. Maryland, 107 S.Ct. at 2533 (capital sentencing is essentially an inquiry into a defendant's "personal responsibility and moral guilt").

When assessing the culpability of juvenile offenders, the Court has recognized in various circumstances that their "moral guilt" is far less than that of mature, morally responsible adult criminals. As Justice Stevens wrote for the plurality in Thompson, "the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult." 108 S.Ct. at 2698 (footnote omitted).[9] Our

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[9] The Court has noted in a number of decisions the lesser culpability of juveniles. See, e.g., May v. Anderson, 345 U.S. 528, 536 (1953) ("Children have a very special place in life which law should reflect.") (Frankfurter, J., concurring); Carey v. Population Services International, 431 U.S. 678, 693 n. 15 (1977); Bellotti v. Baird, 443 U.S. 622, 635 (1979) ("[M]inors often lack the experience, perspective, and judgment" of adults); Eddings v. Oklahoma, 455 U.S. 104, 115-116 (1982) ("Our history is replete with laws and judicial recognition that minors ... are less mature and responsible than adults."); New York v. Ferber, 458 U.S. 747, 757 (1982). For example, the Court has noted:

> The State's interest in the welfare of its young citizens justifies a variety of protective measures. Because he may not foresee the consequences of his decision, a minor may not make an enforceable bargain. He may not lawfully work or travel

society's most absolute and terrible penalty must be reserved for those who know a fully-developed morality and who then transgress that morality. However, it is excessive for individuals who, as a result of their youth, have a morality that is inchoate and whose culpability is thus significantly lessened.[10]4

> where he pleases, or even attend exhibitions of constitutionally protected adult motion pictures. Persons below a certain age may not marry without parental consent.

H. L. v. Matheson, 450 U.S. 398, 421-22 (1981) (Stevens, J., concurring) (quoting Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 102 (1976) (Stevens, J., concurring in part and dissenting in part).

[10] In this regard, it is important to note that the United States is the only western democracy--and one of the few nations in the world--that presently permits the execution of offenders who were under the age of eighteen at the time the crime was committed. See Brief of Amicus Curiae Amnesty International for Petitioner in Thompson v. Oklahoma and these cases.

As established by both the legal limitations placed on the civil rights of those under eighteen and social science, a lessened degree of moral blameworthiness is inextricably caught up in what it means to be a juvenile. This Court has noted that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors ... generally are less mature and responsible than adults." Eddings v. Oklahoma, 455 U.S. 104, 115-16 (1982)(footnote omitted).[11] Youths under eighteen years

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[11] See also Eddings, 455 U.S. at 115, n.11 ("'Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's

of age face numerous legal restrictions on the rights of citizenship granted to others: for example, they may not vote, they may not drink alcoholic beverages, they may not serve on juries, they may not drive, they may not gamble, and they may not buy pornography. All of these restrictions recognize the societal consensus and common knowledge that a lessened responsibility is a concomitant of being young. In fact, every state has a comprehensive and separate juvenile justice system to deal with those of lessened culpability. See Kent v. United States, 383 U.S. 541, 554 n.19 (1966).

Moreover, the psychological makeup of the young weighs against using retribution

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fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.'" (quoting Twentieth Century Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978)).

as a rationale for executing them.[12] The turbulence of the adolescent years, which are generally considered to last from age eleven at least through age eighteen,[13] is caused by the onset of puberty and the transition to formal, logical modes of thinking from more reactive, concrete ways

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12 "Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." Thompson, 108 S.Ct. at 2699.

13 See Hamburg & Wortman, Adolescent Development and Psychopathology, in 2 Psychiatry ch. 4 (J. Cavenar ed. 1985). It is critical to a proper resolution of the issue presented in these cases to recognize that the psychological makeup which results in the lessened moral blameworthiness of youth often extends beyond age eighteen into the early twenties. Building on this recognition, for example, many states do not permit those under the age of twenty-one to consume alcohol. Age eighteen, therefore, is a conservative assessment--rather than a liberal one--of the point at which an individual is sufficiently culpable to be sentenced to death.

of thinking.[14] Adolescence is marked by the relative absence of moral judgment and principles that characterize the thought patterns of adults.[15] Juveniles do not possess the experience or the grounding to be able to formulate a holistic moral universe, and they are dependent upon others, especially older relatives and friends, for moral guidance. Needless to say, the mental and social backgrounds of juveniles who have murdered are rarely healthy.[16]

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[14] See B. Inhelder & J. Piaget, The Growth of Logical Thinking from Childhood to Adolescence (1958).

[15] See Kohlberg & Gilligan, The Adolescent as a Philosopher: The Discovery of the Self in a Postconventional World, Daedalus 1051 (Fall 1971).

[16] In one study of fourteen randomly selected juveniles under the age of eighteen who had been sentenced to death, all fourteen were found to have suffered significant head injuries in childhood, nine were found to have serious neurological abnormalities, seven were diagnosed as psychotic, twelve had been severely physically abused by family members, and five had been sodomized by older male relatives. Lewis, Pincus, Bard, Richardson, Prichep, Feldman and Yeager, Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States, 14 Am. J. Psychiatry 584, 588 (1988).

B. Deterrence fails as a rationale for executing juveniles because they lack the faculties for cold, deliberate calculation.

In Enmund v. Florida, this Court emphasized that capital punishment will only serve as a deterrent when "premeditation and deliberation" have preceded the capitally-punishable crime. Enmund, 458 U.S. at 799 (quoting Fisher v. United States, 328 U.S. 463 (1946) (Frankfurter, J., dissenting)). Those who murder in a flash of rage or on a sudden impulse will not be constrained from killing by a death penalty that is far from their thoughts prior to the crime. Neither will those who have no understanding of death or who lack the capacity to predict the conse-

quences of their actions be deterred. Because it is precisely those under the age of eighteen who are most likely to kill under circumstances such as these, deterrence is not a valid rationale for executing adolescents.

Just as the changes we undergo in our adolescent years generate a rootless moral framework, they also cause teenagers to become more restless, impulsive and prone to risk-taking.[17] This impulsiveness is due to adolescents' dawning ability to reason in the abstract, which opens up new possibilities of experimentation. However, the urge to experiment is combined with a lack of experience and an inability to predict the possibly detrimental conse-

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17 "The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent." Thompson, 108 S.Ct. at 2700.

quences of their actions. All of these factors create in the adolescent mind a desire to try out reckless activities, such as fast driving, promiscuous sex, and drug and alcohol abuse. Due to teenagers' inexperience in predicting consequences, their impulsiveness is generally unaccompanied by fear of death or personal harm.[18]

Being unafraid of death, in fact, is integrally related to the adolescent mindset. Studies of suicide in adolescence show that teenagers often do not comprehend that death is different or that death could happen to them; "only old people die." In fact, suicide is the third leading cause of death among this

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18 See Irwin & Millstein, Biopsychosocial Correlates of Risk-Taking Behaviors, 7 J. Adolescent Health Care, No. 6S (Nov. 1986 Supp.).

age group.[19] Threatening to execute someone who is not afraid of being dead is a futile exercise and serves no valid penological purpose.

Finally, although it is of course true that if a particular teenager is executed, that particular teenager will not have an opportunity to kill again, specific deterrence is not a valid justification for executing teenagers. Juveniles convicted of murder and incarcerated have been overwhelmingly shown to be model prisoners and very rarely commit further crimes after incarceration.[20] By

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19 See Sheras, Suicide in Adolescents, in Handbook of Clinical Child Psychology 759, 769-770 (C. Walker and M. Roberts eds. 1983); see also Kastenbaum, Time and Death in Adolescence, in The Meaning of Death 99 (H. Feifel ed. 1959); Fredlund, Children and Death from the School Setting Viewpoint, 47 J. School Health 533 (1977).

20 See Vitello, Constitutional Safeguards for Juvenile Transfer Procedure: The Ten Years Since Kent v. United States, 26 De Paul L. Rev. 23, 32-34 (1976).

definition, they are young, are capable of rehabilitation, and may benefit from some of the social services unavailable to them prior to prison. However, "[c]apital punishment of our children inherently rejects humanity's future, which rests with the habilitation and rehabilitation of today's youth." Streib, The Eighth Amendment and Capital Punishment of Juveniles, 34 Cleve. St. L. Rev. 363, 395 (1987) (footnote omitted). Thus, a deterrent that does not deter juveniles should not be applied against them, as it furthers no constitutionally valid societal interest, and is "nothing more than the purposeless and needless imposition of pain and suffering." Coker, 433 U.S. at 592.

CONCLUSION

In resolving the constitutional question presented in this case--whether the Eighth Amendment sanctions the imposition of the death penalty upon those under the age of eighteen--this Court's decision is not delimited by the actions of various legislatures, judges and juries. In the final analysis, this Court must bring to bear its own judgment in order to determine if our evolving standards of decency permit the execution of our children. The Court's independent judgment is not standardless, however, but rather is informed by examining the intrinsic characteristics of juveniles in light of the valid constitutional purposes of capital punishment. Such an examination in this case reveals that the imposition of the death penalty upon the very young--those under the age of

eighteen--serves no legitimate penological purpose and thus violates the Eighth Amendment. Therefore, the Court should vacate the sentences of death in these cases and remand them for the imposition of sentences of life imprisonment.

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